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IN RE THE A. & CO., LTD. PROVIDENT FUND.

[Appeal from Assessment of War Tax (Aitken, J. (Chairman), E. C. H. Charlwood and P. Sammy (Commissioners)) October 18, 1941]

War Tax Ordinance (1940) Ss. 2, 5, 6,—meaning of "association" — whether provident fund made up, of contributions from Company and its employees liable to pay war tax.

The question in this appeal was whether a provident fund made up of contributions from a Company and its employees, was an "association" within the meaning of Section 2 of the War Tax Ordinance and whether it was liable to pay war tax on the sum of $12,489.00 the "excess of income over expenditure" of the Fund for the year ending 31st December 1940.

Held, (1) that the contributors to the Provident Fund (including the Company) might properly be regarded as an "association" within the meaning of that expression as defined in Section 2 of the War Tax Ordinance.

(2) that the association must be regarded as being in receipt of the income of the fund and so liable to pay war tax on it.

Semble, that Section 6 (1) of the War Tax Ordinance seemed to indicate an intention, on the part of the Legislative Council, to tax the income of such Provident Funds as this unless special exemption was granted by the Governor in Council; and if it was possible to make the machinery set up by the Ordinance work so as to give effect to that intention, that ought to be done.

F. G. Vaux for the A & Co., Ltd. Provident Fund.

E. Tongue (Collector-General) in person.

Aitken J. :—For the year ending the 31st of December, 1940, the "excess of income over expenditure" of the A & Co., Ltd. Provident Fund was $12,489.00. It is admitted that this is the amount upon which War Tax at the rate of 6% is payable for the year 1941 if any company, association or person is liable to pay it under the terms and provisions of the War Tax Ordinance, 1941.

The Collector contends that the A & Co., Ltd. Provident Fund is an "association" within the meaning of that term as defined in section 2 of the Ordinance, and is therefore liable to pay war tax on this sum of $12,489.00 under section 5 of the Ordinance.

Mr. Vaux denies that the A & Co., Ltd. Provident Fund is such an association and contends, further, that even if it is, all the monies and other properties of the fund are vested in Trustees who have "the exclusive administration and control" of the same and the income arising therefrom. According to him there are no provisions in the Ordinance under which the trustees can be held chargeable with war tax in respect of any income arising from such monies and other properties.

Mr. Tongue, who appeared for the Collector at the hearing of this appeal, did not contend that there are any provisions in the Ordinance under which the trustees can be held chargeable with war tax in respect of the income of the fund. He admitted that the Defence (War Tax No. 2) Regulations, 1941, are *ultra vires,* and that he could not rely on the new section 25A which they purport to insert into the Ordinance. A former suggestion of his that the trustees are liable to deduct war tax from sums credited to contributors in the Fund's books was specifically withdrawn.

What the A & Co., Ltd. Provident Fund really is appears clearly enough from a perusal of the rules thereof, which are in evidence as exhibit A, and from its "income and expenditure account and balance sheet for the year ended 31st December 1940" which is annexed to the petition of appeal. The fund consists of the aggregate sum arising from (a) contributions of the company's employees who are members of the fund, (b) the company's contributions to the fund, (c) the interest accruing due on the Government and other securities in which those contributions are invested, and (d) the interest accruing due on the $25,000 capital with which the company endowed the fund at its inauguration; see rule 13.

This aggregate sum (including all the securities in which it is from time to time invested) is vested in trustees who, as provided in rule 3, have "the exclusive administration and control of the fund and its income in accordance with the rules for the time being in force". Rule 9 provides who are and shall be the contributors to the fund, and there are undoubtedly a number of individuals who make regular monthly contributions to the fund, and all of whom have valuable though indefinite rights and interests in the monies and other properties of the fund (except in the capital of the $25,000 with which Messrs. A & Co., Ltd. endowed the fund at its inauguration on the 1st of January, 1920).

It is also a fact that towards the end of 1940 the A & Co., Ltd. Provident Fund, acting through the President and Vice President of the trustees and a gentleman who is both a trustee and the Secretary of the fund, applied for and obtained exemption from registration under the Societies Ordinance: see Gazette

Notification No. 4222 of the 6th December, 1940. Presumably those persons were advised and believed that the Fund might properly be regarded as a Society to which that Ordinance applies, and section 2 thereof defines a society as including

"Any club, company, partnership or association of ten or more persons, whatever its nature or object", but as excluding—

"(a) any company registered under the law for the time being relating to joint stock companies;

(b) any company or association constituted under Royal Charter, or Royal Letters Patent, or any Imperial Act, or any Ordinance;

(c) any Lodge of Freemasons regularly constituted under any of the registered governing bodies of Freemasons in the United Kingdom of Great Britain and Northern Ireland;

(d) any company, association or partnership, consisting of not more than twenty persons formed for the sole purpose of carrying on any lawful business other than that of banking;

(e) any trade union registered under any Ordinance for the time being regulating trade unions."

From the application for exemption from registration under the Societies Ordinance (Exhibit 1) we gather that the present number of employee contributors to the A & Co., Ltd. Provident Fund is round about 26. The number of employee contributors must, of course, vary from time to time as the eligible employees join and leave the Company's service; but their exact number and their respective contingent rights and interests in the fund at any date are readily ascertainable, and they may reasonably be regarded as being associated together and with the Company in the common object of building up and maintaining a fund out of which some provision will be made for themselves and their dependents on their leaving the Company's service.

Upon consideration of these facts and circumstances we are agreed, I think, that the present contributors to the A & Co., Ltd. Provident Fund (including the Company itself) may properly be regarded as "association of persons", and therefore as an "association" within the meaning of that expression as defined in section 2 of the War Tax Ordinance. But it seems to me that our decision of that question in favour of the Collector does not render those contributors liable to War Tax unless, as such an association, they are in receipt of an "income".

The question — can the present employee contributors and the Company, in their associate capacity, be regarded as being in receipt of the income of the fund, has given me the greatest difficulty: and I confess that I have hesitated a long time before coming to the conclusion that the answer is probably in the affirmative. Indeed, but for the clear opinion on the point at which the other two members of the Board have been able to arrive, I might have reached a different conclusion.

Rule 15 of the rules provides as follows:—

"The income arising from the investments of the Fund, less the cost of operating the Fund, shall be placed to the credit of contributors to the Fund, being divided amongst them proportionately to the amounts standing to the credit of each in the books of the Fund at the date of the closing of the annual accounts of the Fund."

If these provisions stood by themselves, there would be no difficulty in regarding the present employee contributors as being in receipt of the whole income of the Fund; but there are other rules which whittle down the rights of such contributors in the income of the Fund should certain events come to pass. These other rules are Nos. 16a, 17, 17a, 18, 18a, 19, 19a, and 22, and they clearly indicate that no employee contributor has any vested right to a definite share of the fund or its income until he retires in due course from the Company's service. Even then a supervening bankruptcy or an attempt to assign, charge or alienate his retiring allowance, might operate as a forfeiture of the same.

But in spite of the provisions of these last mentioned eight rules one thing does appear to emerge with reasonable clearness and it is this:—that the present employee contributors to the fund are entitled to the whole of its income, though their proportionate shares in the same will not be finally determined until some indefinite later date.

Now I have already indicated that in my opinion the association with which we are dealing consists of the present employee contributors to the fund and the Company itself, since the Company is not only a contributor to the Fund but is very much concerned in carrying out the common object. The fact that the company itself has no right or interest in the fund or its income does make the position a little difficult; but if the Company, as a member of the association, decides to take no share in the fund and limits its associate activities to providing a part of the fund and arranging for its distribution amongst the other members of the association, its decision in that respect need not prevent us from regarding the association as being in receipt of the income of the fund.

Even if that view be quite correct I cannot say that I feel any great confidence in upholding the Collector's assessment because the provisions of Part VI of the Ordinance, which relate to the recovery of war tax, do not seem to fit in very well with the facts of this case, and the provisions of section 28(a) and (c) of the Societies Ordinance. However, even

though the fund itself and its income are vested in trustees who cannot be made chargeable in person under the Ordinance, yet I suppose the monies and investments held by them as such trustees may properly be regarded as the property of the association for War Tax purposes and so liable to seizure in execution.

For the reasons which I have set out above, and not without doubt and difficulty, I have come to the conclusion that the Collector's assessment in this case should be upheld. Section 6(1) of the Ordinance seems to indicate an intention, on the part of the Legislative Council, to tax the income of such Provident Funds as this unless special exemption is granted by the Governor in Council; and if it is possible to make the machinery set up by the Ordinance work so as to give effect to that intention, I think that we ought to do so.

This appeal will therefore be dismissed.

E. C. H. Charlwood and P. Sammy:—The facts of the case are fully set out in the learned Chairman's statement of the case with which we agree and we do not think it is necessary to make any additions thereto. We propose to deal with the grounds raised by the petition of the Trustees of A & Co., Ltd. Provident Fund.

A & Co., Ltd. Provident Fund (hereinafter referred to as "the Association") has been exempted from registration under the Societies Ordinance and the benefits conferred on it as an exempted Society under the Ordinance are (among other things) that its property, if not vested in trustees, would be deemed to be vested for the time being in its governing body, that it may sue or be sued in the name in which it was exempted under the Ordinance. If the Association as such is liable to payment of tax and default thereof is made, proceedings may be taken against its principal officer (which includes its secretary, treasurer, manager or agent) and any judgment obtained or order made cannot be enforced against him or his property but may be enforced against the property of the Association.

Under the rules of the Association its property is vested in trustees who are not the beneficial owners thereof, whether corpus or income, but they are persons who hold the same either as trustees, managers or agents in trust for or on behalf of the Association according to its rules.

In the course of administration or management the Trustees have invested the funds of the Association and earned the sum of $12,489 for 1940. They may not have carried on a trade or business in the strict commercial sense but the investments made by them whether it be called a business or undertaking or concern have brought in an income which is liable to taxation.

In dealing with the question whether the Association is liable or not, it will be convenient to refer to the position of a company. When a company pays tax on its profits, it does not pay it as agent for its shareholders but pays as a taxpayer. If no dividend is declared by the company, the shareholders are not concerned in the payment of tax by the company. If a dividend is declared, the company is entitled to deduct from such dividends the tax appropriate thereto. A shareholder as such is not chargeable to tax in respect of his dividend nor does he pay or bear an integral part of the taxation imposed upon the company.

In our opinion the tax is payable by the Association as an association. It does not pay as an agent for its contributors but pays as taxpayer itself. The trustees or the contributors are not liable to payment of tax but the Association itself is. In case the trustees pay the tax, they will be indemnified under the War Tax Ordinance in respect of any claim by any person whomsoever for payment thereof.

The legislature must have intended that any association like the one under consideration should be liable to taxation otherwise certain funds exempted under section 6(1) of the War Tax Ordinance would not be specifically set out. The Governor in Council may grant any association exemption from taxation.

Having regard to all the circumstances of the subject matter of the petition, we find that the Association is liable to taxation. This appeal will therefore be **dismissed.**

Appeal dismissed.

IN RE A. B.

[Appeal from Assessment of War Tax (Aitken, J. (Chairman), R. Crawford and E. N. C. Woollerton (Commissioners)) November 26, 1941]

War Tax Ordinance, 1941, s. 7 (b)—No double income tax.

Whenever income which arises in this Colony pays income tax at not less than the prescribed rate in some other part of the British Empire, it is exempted from taxation in the Colony under s. (7) (b) and s. 30 of the War Tax Ordinance, 1941. For this purpose it is immaterial whether the income is treated in one place as being the property of certain individuals and in the other place as being the notional property of a partnership or association composed of those individuals.

APPEAL.

Roland Braddell for appellant.